TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 583.

AMERICAN EXPRESS COMPANY OF NEW YORK,
PLAINTIFF IN ERROR,

vs.

THE COMMONWEALTH OF KENTUCKY.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

FILED JANUARY 26, 1907.

(20,548.)

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1 Pleas before the Honorable the Court of Appeals of Kentucky, at the Capitol, at Frankfort, on the Fifth Day of December, A. D. 1906.

Be it remembered that on the sixth day of June A. D. 1906, the appellant by its attorney filed in the office of the Clerk of the Court of Appeals a transcript of the record, and which is in words and figures as follows:—

2 Larue Circuit Court.

Pleas before C. T. Atkinson, Special Judge Larue Circuit Court, at the Court House in Hodgensville, Ky., May —, 1906.

COMMONWEALTH OF KENTUCKY
vs.
THE AMERICAN — COMPANY.

Appeal.

Hodgensville Police Court.

The Commonwealth of Kentucky to the Town Marshal of Hodgensville, Kentucky:

You are commanded to summon The American Express Company to appear before me as Judge of the said court on the 24 day of April 1905, to answer the charge of unlawfully selling, bartering and loaning spirituous liquor in the town of Hodgensville, Larue County, Kentucky, a territory in which the local option law was at the time in force, which offense was committed on the — day of March 1905 and have then and there this writ and with due return as to how you have executed it.

3 Given under my hand as Police Judge of the town of Hodgensville, this the 19″ day of April, 1905.

JOHN H. BURBA,
Police Judge, Hodgensville.

Endorsed on the back as follows:

APRIL 20, 1905.

Execute- on the American Express Company by delivering a true copy of the within summons to J. R. Langley, Agent.

J. H. CUNDIFF, *M. H.*

Com. Wit.:
RICHARD GRAYHAM.

On May the 24″ 1905 The American Express Company filed the judgment on the Police Court, to wit:

Judgment.

Monday 15th day of May, 1905.

Hodgensville Police Court, John H. Burba, Judge, Sitting as a Magistrate.

4 Selling Spirit-ous Liquor, Town of Hodgensville, Local Option Territory.

COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
AMERICAN EXPRESS COMPANY, Defendant,

&

COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
JOHN R. LANGLY, Defendant.

Judgment.

Selling Spirit-ous Liquor, Town of Hodgensville, Local Option Territory.

These two causes came on to be tried this the 15th day of May 1905, and the defendants being present, by attorney, the defendant the American Express Company present by agent, and the defendant J. R. Langly, being present in person, on motion of def'ts attorney and no objection being made by county attorney the two cases were tried out together and by agreement of parties the law and facts were submitted to the Court, and the Court being sufficiently advised is of the opinion that both of the defendants are guilty of the offense as charged, and their punishment is hereby fixed at a fine of one hundred dollars each. It is therefore adjudged that the Com-
5 monwealth of Kentucky recover of the defendant the American Express Co., the sum of one hundred dollars and the costs about this action and may have execution. It is further adjudged that the Commonwealth of Kentucky recover of the defendant John R. Langley the sum of one hundred dollars and the costs about this action and capias may issue.

To all of which the defendants except and pray an appeal to the Larue Circuit Court which is granted.

JOHN H. BURBA,
Police Judge, Hodgensville.

A copy attest.

Came the American Express Company and executed an Appeal Bond.

Following is the Appeal Bond,

Bond.

COMMONWEALTH OF KY., Pl'ff,
vs.
AMERICAN EXPRESS CO., Def'ts.

Appeal Bond.

6 The American Express Company having prayed an appeal to the Larue Circuit Court from the judgment of John H. Burba presiding Judge of the Hodgensville Police Court for Town of Hodgensville Now we The American Express Co., principal and C. H. Moorman sureties covenant that The American Express Co. will satisfy and perform the judgment that shall be rendered upon appeal.

Witness our hands this 24" day of May 1905.

C. H. MOORMAN.
J. R. LANGLEY.

Supersedeas issued and return by the sheriff executed on 24" day of May 1905 against the Police Judge and thereupon the Police Judge returned the original record in the Circuit Clerk's office. Then summons issued against the American Express Company returned executed the 24" day of May 1905.

October term the 6" day of October 1905 the following
7 order was entered

Order.

By agreement of parties continued on motion of the Commonwealth's attorney. It is ordered that attachment issue for Richard Grayham and he be permitted to give bail in the sum of one hundred dollars for his appearance January term 1906.

May term, the 8" day of May 1906, the following order was entered,

Order.

This day came the Commonwealth's Attorney and announced ready for trial. Came defendant by attorney and entered a plea of not guilty, and announced ready for trial. Came the following jury to wit: W. B. Roberts, B. F. Shipp, Smith Foster, J. B. Redmon, T. A. Lee, T. M. Sprowls, S. M. Catlett, Henry Pennington, J. A. Lamkin, J. B. Holland, J. W. Smith, Virgil Brooks who were duly empaneled and sworn to try the issue. On motion of the defendant it is ordered that Arch Pulliam the Official Stenog-
8 rapher take the full and complete proceedings of this case.

At the conclusion of the evidence for the Commonwealth defendant moved the Court for peremptory instructions. The Court

being advised overruled said motion to which defendant excepts. At the conclusion of all the evidence the defendant renewed his motion for peremptory instructions and the Court being advised overruled said motion to which defendant excepts. After hearing all the evidence and receiving instructions they were permitted to go to their room to consider of their verdict. After some time returned to open court the following verdict to wit:

We the jury find the defendants guilty and fix their fine at one hundred dollars ($100).

(Signed) T. A. LEE,
One of the Jury.

Came defendant by its attorney and moved the court to arrest judgment and the same was submitted to the court and the court being advised overruled said motion to which the defendant
9 excepts;

Wherefore it is adjudged by the court that the Commonwealth of Kentucky recover of the defendant the sum of one hundred dollars ($100) and the costs of this prosecution and execution may issue.

May term, 10" day of May 1906 the following order was entered,

Order.

This day came defendant by its attorney and filed grounds and moved the court to set aside verdict and judgment and grant a new trial herein and the same was submitted to the court and the court being advised overruled said motion and refused to grant a new trial to which the defendant excepts. The defendant prayed an appeal to the Court of Appeals which is granted upon condition that he lodge in the Clerk's office of said Court a transcript of the record in sixty days from the date of judgment.

10 Following is the motion and grounds for new trial referred to by the above order:

Motion and Grounds for New Trial.

The defendant The American Express Company moves the Court to vacate and set aside the verdict and judgment and to grant it a new trial herein for the following reasons, because

1st. Because the Court erred to the prejudice of the defendant in overruling motion for peremptory instruction to find for it made at the conclusion of the Commonwealth's evidence, to which ruling of the Court in overruling said motion the defendant at the time excepted and still excepts.

2nd. Because the Court erred to the prejudice of the Def't in overruling its motion for a peremptory instruction to find for it at the conclusion of all the evidence, to which ruling of the Court in overruling said motion the Def't at the time excepted and still excepts.

3rd. Because the Court erred to the prejudice of the defendant in giving to the jury instructions No. *1-2-3-4 & 5* to the giving of each and all of which the defendants at the time excepted and still excepts.

4th. Because the verdict of the jury is against the law and evidence and is contrary to the law and evidence.

C. H. MOORMAN,
Counsel for Defendant.

May term, the 14th day of May 1906 the following order was entered,

Order.

Came The American Express Company and tendered and moved to file its Bill of Exceptions and the statement of evidence as shown by the Official Stenographer's transcript and moved the court to sign, approve and attest the same and the Court being advised sustained said motion and said Bill of Exceptions and statement of evidence in duplicate are here filed, approved and attested by the court and said statement of evidence in duplicate for identification marked "X."

Following is the Bill of Exceptions referred to by the above order.

Bill of Exceptions.

Be it remembered that on the trial of this case in the Larue Circuit Court at its May term 1906 the Commonwealth of Kentucky introduced as witnesses Richard Graham and W. A. Robinson, both of whom were sworn and testified in this case and all of their evidence given on the trial of this case, together with all objections made and exceptions taken thereto is set out in the Official Stenographic report filed herewith as part hereof in duplicate, and for identification marked "X."

And this was all of the evidence offered by the plaintiff or admitted by the Court on its behalf, and at the conclusion thereof the defendant The American Express Co. moved the Court to peremptorily instruct the jury to find for the defendant, which motion was objected to by the plaintiff and the Court being advised overruled said motion and refused to give said instruction, to which ruling of the court and refusal the defendant at the time excepted and still excepts.

Thereupon Defendant introduced as a witness for it J. R. Langley, who was sworn and testified in this action and his evidence given on the trial of this case, together with all objections made thereto is set out in said Official Stenographic report filed herewith in duplicate as part hereof and for identification marked "X."

Thereupon the defendant read the deposition of M. E. Stone,

with exhibits thereto attached, which deposition and exhibits are in words and figures as follows:

Deposition.

1. Where do you live and what is your occupation?
2. Are you manager for any distilling company or wholesale liquor firm?
3. If so which and where are the officers and place of business of said company or firm?
14 4. If in Cincinnati, Ohio, state how long the officers have been in that city and state if liquors are kept and stored at said offices or at the firm's warehouses in that city.
5. Does your firm handle whiskies made in Kentucky and does it buy and sell or handle whiskies made in other states?
6. Did you or your firm on or about the — day of — consign to Richard Grayham at Hodgensville, four quarts of whiskey?
7. If so, was the said whiskey consigned on an order?
8. If you received an order for the consignment please state whether the order was received from a traveling salesman or by mail direct from Richard Grayham at Hodgensville, Ky.?
9. If you have the order please file it with your deposition and mark it "Exhibit X."
10. If you received the order from a traveling salesman give his name and state if he is now working for your company and if so where is he located at present?
11. Have you a resident agent for your company at Hodgensville, Ky. if so give his name?
15 12. State if the dates of the order and the shipment of the liquor to Hodgensville co-incide, if not, explain why they do not.
13. How was the whiskey in question shipped to Richard Grayham?
14. Was it shipped from Cincinnati, Ohio, and was it taken from your firm's store houses in that city?
15. State whether or not it was Kentucky made whiskey, if so does your firm handle that make of whiskey as a wholesale house?
16. State whether you delivered the consignment to the American Express Co. for transportation to Hodgensville, Ky., as a common carrier and if so did the agent of the company with whom the contract of shipment was made, have specific notice or knowledge that the package contained liquor or that it was to be carried into a prohibition district?
17. Was the whiskey in question shipped to Richard Gray-
16 ham C. O. D., if so explain what is meant by a C. O. D. shipment?
18. Has the Kentucky Falls Distilling Company any office, warehouse, or branch of any kind in Kentucky?

Cross-interrogatories to be Propounded to M. E. Stone.

1. Do you work for a distilling Co.?
2. What is the name?
3. Is this whiskey sold to Richard Graham, as Kentucky made, made in Kentucky, if so by whom?
4. In what state (*a*), county (*b*), and in what city (*c*), and by what person, firm or corporation (*d*) was this 4 quarts of whiskey made, which was shipped to Richard Graham?
5. Did the firm or person who manufactured the said whiskey, have or own any interest in it at the time it was shipped?
6. How long had the Kentucky Falls Distilling Company had this whiskey in its possession when the shipment was made to Graham?

17 7. Did the Kentucky Falls Distilling Company make this whiskey?

8. Was this identical whiskey ever sold, after manufacture and prior to the shipment to Graham?
9. If you state that your firm the Kentucky Falls Distilling Company purchased it from another firm or person, who manufactured it state whether your said firm is owned in whole or in part by this manufactory or whether this manufacture is owned in whole or part by your firm, or are they run in connection either as firms or through their individual stockholders?
10. File the bill, or a copy of same, which you received of the Manufacturer who shipped the lot of liquor to you, which contained this identical 4 quarts.
11. Through the hands of how many owners had this whiskey passed, and name them, from manufactory to Graham?
12. Why was it sent from Kentucky to Cincinnati before shipment to Kentucky customers?

18 13. If there is any thing else you know about this 4 quarts of whiskey having been made in Kentucky, and the methods employed by the makers and owners, to reach this customer in this local option town, tell how it was done.

14. Tell how this trade was opened by you in Hodgensville.
15. Did you receive Richard Graham's name from any one before shipment, if so, who sent it to you?
16. Did you have an arrangement, either directly or indirectly with any one at Hodgensville, or elsewhere, by which you came into possession of the name of said Graham preparatory to this shipment?
17. What did the person or persons so furnishing you with orders or prospective customers at this place receive for this work?
18. Did you receive this name and others to whom you shipped at this time, and which enabled you to open up your trade in this town, without previous arrangement on your part or other officers of your firm, if so tell how you came by them?

19 19. Do you know how or by what method Richard Graham's name reached your firm? If so state in minute detail?

20. Was this shipment a mere venture to see what cus-

tomers would take out the goods, if so how did you pick on the names you would try?

21. Did the Express Company have instructions, in case this or any package of like character was not received by the consignee to deliver it to any one who would pay the charges on same, and does it do this under your instructions?

22. If you say you were not simply venturing from whom did you have assurance that the liquor would be received and paid for?

23. State the residence of any one who furnished you with this information name and whole connection with the affair?

24. Has any one received directly or indirectly anything in the way of money or other thing for assisting in this trade at Hodgensville, Ky. if so state who and what it was?

25. Was there any one connected with your firm directly or indirectly in Larue County or in the State of Kentucky, as an employé or member of your firm, assisting in any way in this shipment, if so state who it was and their connection?

26. Was there any one so assisting not connected with your firm but on their own account if so state who and their connection in the matter?

27. Does your firm send agents or salesman into such local option territory, and did you in this case to collect prospective customers. If you did who was the agent or salesman in this case and where is he now?

28. Did J. R. Langley the defendant in this case and agent at Hodgensville act — any one of the capacities indicated in any one or more of these questions from 14 to 28 inclusive examine carefully and answer as to each act he has in connection therewith?

29. Did the defendant the American Express Company's agent at Cincinnati know or have any knowledge of the contents of this package or its destination in a local option territory?

30. Is it not a fact that this agent knew of the contents of this package, that is that it contained whiskey?

30. Did any agent or representative of the said Express Co. know of the fact that this package contained whiskey when it was received for shipment to Hodgensville, or before it reached its destination?

31. Did you know that Hodgensville was a local option town at the time of shipment?

32. Did you or your firm ever ship any of these packages to this town before Jan. 22nd, 1905?

33. Why did you send the package without any advertisement of your business on the outside?

34. Is it not customary to advertise your business on all packages shipped, as a rule, when they are not sent into local option territory?

35. If you say that you do not always leave off the advertisement from packages, state if the territory into which the shipment is going has anything to do with your action in the matter and how it controls it.

36. Is your main business to ship into local option territory or do you do a general business?

—. What arrangement have you with the Express Co. defendant herein about the packages going into local option territory, passing through their hands without any outside disclosures different from other shipments?

38. Does it or not through its agents, understand the contents of these packages, and did it not thus know the contents of the Graham package?

39. Who compose the Kentucky Falls Distilling Company?

40. Is it incorporated? If so what business does it propose in the articles of incorporation, to carry on?

42. If you know anything more than you have stated that will throw any light on the transaction with Graham state it.

Following are the depositions of M. E. Stone upon the above interrogatories and cross-interrogatories. The said M. E. Stone having been first duly sworn, deposes as follows:

23 Interrogatory 1. Where do you live and what is your occupation?

Answer to Int. 1. 2360 Concord Street, Cincinnati, Ohio. My occupation is manager of Kentucky Falls Distillery Co.

2. Are you manager for any distilling company or wholesale liquor firm?

A. Yes as above.

3. If so which and where are the offices and place of business of said company or firm?

A. 326 McFarland Street, Cincinnati, Ohio.

4. If in Cincinnati, Ohio, state how long the offices have been in that city and state if liquors are kept and stored at said offices or at the firm's warehouses in that city?

A. Since beginning business February 1905. Liquors are kept on said premises where both office and warehouse are maintained.

5. Does your firm handle whiskies made in Kentucky and does it buy and sell or handle whiskies made in other states?

24 A. We handle Kentucky whiskies and whiskies from other localities.

6. Did you or your firm on or about the — day of —— consign to Richard Graham at Hodgensville, Kentucky, four quarts of whiskey?

A. We did on March 21, 1905.

7. If so was said whiskey consigned on an order?

A. The whiskey was shipped to Richard Graham upon an order received from him.

8. If you received an order for the consignment please state whether the order was received from a travelling salesman or by mail direct from Richard Graham at Hodgensville, Ky.?

A. We received the order by mail.

9. If you have the order please file it with your deposition and mark it "Exhibit X."

A. Order filed marked "Exhibit X."

10. If you received the order from a traveling salesman give his name and state if he is now working for your company, and if so where is he located at present?

A. We received the order through the mail and presumed it came from Richard Graham.

11. Have you a resident agent for your company at Hodgensville, Ky. if so give his name?

A. No.

12. State if the dates of order and the shipment of liquor to Hodgensville Co-incide, if not explain why they do not?

A. They do.

13. How was the whiskey in question shipped to Richard Graham?

A. By American Express Co.

14. Was it shipped from Cincinnati, Ohio, and was it taken from your firm's storehouse in that city?

A. Shipped from Cincinnati and taken from our premises 326 McFarland street, Cincinnati, Ohio.

M. E. STONE.

Page 2, Depositions.

15. State whether or not it was Kentucky made whiskey, if so does your firm handle that make of whiskey as a wholesale house?

A. I do not recall.

16. State whether you delivered the consignment to the American Express Co. for transportation to Hodgensville, Ky. as a common carrier and if so, did the agent of the company with whom the contract of shipment was made, have specified notice or knowledge that the package contained liquor or that it was to be carried into a prohibition district?

A. Delivered for transportation as a carrier. We gave no specific notice to agent of the Company that package contained liquor or that it was to be carried into a local option district.

17. Was the whiskey in question shipped to Richard Graham C. O. D., and if so explain what is meant by C. O. D. shipment.

A. Yes, C. O. D. means that the package was to be paid for and the money collected on delivery by the Express Company to the consignee and the money paid returned to us by the Express Co.

18. Has the Kentucky Falls Distilling Company any office, warehouse, or branch of any kind in Kentucky?

A. No.

Cross Interrorgatory No. 1. Do you work for a distilling Co.?

A. I am manager of a distilling Co.

2. What is the name?

A. Kentucky Falls Distilling Company.

3. Is this whiskey sold to Richard Graham as Kentucky made in Kentucky, if so by whom?

A. I do not recall whether sold as Kentucky whiskey or not.

4. In what state (*a*), county (*b*), and in what city (*c*), and by

what person, persons, firm, or corporation (*d*) was this 4 quarts of whiskey made, which was shipped to Richard Graham?

A. I do not recall.

5. Did the firm or person who manufactured the said whis-
28 key have or own an interest in it at the time it was so shipped?

A. No.

6. How long had the Kentucky Falls Distilling Company had this whiskey in its possession when the shipment was made to Graham?

A. I do not recall.

7. Did the Kentucky Falls Distilling Company make this whiskey?

A. No.

8. Was this identical whiskey ever sold after manufacture and prior to the shipment to Graham?

A. We bought it outright from the distiller and sold it to Graham.

9. If you state that your firm the Ky. Falls Distilling Company purchased it from another firm or person, who manufactured it, state whether your said firm is owned in whole or in part by this manufacturer or this manufacturer is owned in whole or in
29 part by your firm, or are they run in connection either as firms or through their individual stockholders?

A. No. We are not owned in whole or in part by this manufacturer nor do we own the manufacturer in whole or in part, and there is no connection whatsoever.

10. File the bill, or a copy of the same, which you received of the manufacturer who shipped the lot of liquor to you, which contained this identical 4 quarts.

A. We can not identify the bill for whiskey containing this 4 quarts.

M. E. STONE.

Page 3, Depositions.

11. Through the hands of how many owners has this whiskey passed and name them from the manufacturer to Graham.

A. Ours only.

12. Was it sent from Kentucky to Cincinnati before shipment, to Kentucky customers?

30 A. We bought the whiskey in Cincinnati and know nothing of handling it prior to that time.

13. If there is anything else that you know about this 4 quarts of whiskey having been made in Kentucky and the methods employed by the makers and owners to reach this customer in this local option town tell how it was done.

A. Nothing.

14. Tell how this trade was opened up by you in Hodgensville.

A. I do not recall.

15. Did you receive Richard Graham's name from any one before shipment, if so who sent it to you?

A. I do not recall.

—. Did you have an arrangement, either directly, or indirectly, with any one at Hodgensville, or elsewhere, by which you came into the possession of the name of said Graham preparatory to this shipment?

A. I do not recall any such arrangement.

17. What did the person or persons so furnishing you with
31 orders or prospective customers at this place receive for this work?

A. This is answered by my answers to the last three questions.

18. Did you receive this name and others to whom you shipped at this time, and which enabled you to open up your trade in this town, without previous arrangement on your part or other officers of your firm if so tell how you came by them.

A. I do not recall.

19. Do you know how or by what method Richard Graham's name — your firm? If so state in minute detail.

A. I do not.

20. Was this shipment a mere venture to see what customers would take out the goods, if so how did you pick on the names you would try?

A. This shipment was made on the strength of an order received from Richard Graham.

32 21. Did the Express Company have instructions, in case this or any package of like character was not received by the consignee to deliver it to any one who would pay the charges on the same, and does it not do this under your instructions?

A. No.

22. If you say you were not simply venturing from whom did you have assurance that the liquor would be received and paid for?

A. From no one.

23. State the residence of any one who furnished you with this information name and whole connection with the affair.

A. I cannot answer that by answer alone.

24. Has any one ever received directly or indirectly anything in the way of money or other thing for assisting in this trade at Hodgensville, Ky. If so state who and what it was?

A. No one to my knowledge.

25. Was there any one connected with your firm directly
33 or indirectly in Larue Co. or the state of Kentucky, as an employé or member of your firm, assisting in any way in this shipment, if so state who it was and their connection?

A. I do not recall any one.

26. Was there any one so assisting not connected with firm but on their own account, if so state who and their connection in the matter?

A. I do not recall any one.

M. E. STONE.

Page 4, Depositions.

27. Does your firm send agents or salesmen into such local option territory and did you in this case to collect prospective customers. If you did who was the agent or salesman in this case and where is he now?

A. I do not recall sending any salesmen into that territory.

28. Did J. R. Langley, the defendant and agent at Hodgens-
34 ville in this case act in any one of these capacities indicated in any one or more of these questions from 14 to 28 inclusive examine carefully and answer as to each act he has had in connection therewith?

A. No he did not and had no connection with it.

29. Did the defendant The American Express Company's agent at Cincinnati know or have any knowledge of the contents of this package or its destination in local option territory?

A. Not to our knowledge.

30. Is it not a fact that this agent knew of the contents of this package, that is that it contained whiskey.

A. I don't know he had no knowledge from us.

30. Did any agent or representative of the Express Co. know of the fact that this package contained whiskey when it was received for shipment to Hodgensville, or before it reached its destination?

A. I don't know.

—. Did you know that Hodgensville was a local option town at the time of shipment?

35 A. I did not.

32. Did you or your firm ever ship any of these packages to this town before Jan. 22nd, 1905?

A. No, we were not in business then.

33. Why did you send the packages without any advertisement on the outside?

A. I don't know that we did.

34. I*d* it not customary to advertise your business on all packages shipped as a rule, when they are not sent into local option territory?

A. No.

35. If you say that you do not always leave off the advertisement from packages state if the territory into which the shipment is going has any thing to do with your action in the matter and how it controls it.

A. This is covered by my answer to #34.

36. Is your main business to ship into local option territory or do you do a general business?

36 A. We do a general business.

37. What arrangement have you with the Express Co. defendant herein about the packages of this kind going into local option territory, passing through their hands without any outside disclosure different from other shipments?

A. We have no arrangement.

38. Does it or not through its agents understand the contents

of these packages and did it not thus know the contents of the Graham package?

A. Not to my knowledge.

39. Who composes the Kentucky Falls Distilling Company?

A. W. M. Byrne and M. E. Stone.

40. Is it not incorporated, if so what business does it propose in the articles of incorporation, to carry on?

A. Not incorporated.

42. If you know anything more than you have stated that will throw any light on the transaction with Graham state it.

A. I do not.

M. E. STONE.

37 *Certificate.*

STATE OF OHIO, *Hamilton County, ss:*

I, Ben B. Nelson, a notary public in and for the county and state aforesaid, do certify that the above and foregoing deposition of M. E. Stone was taken before me at my office in the City of Cincinnati County of Hamilton and State of Ohio, on the 4th day of October, 1905, upon the interrogatories hereto annexed; that said witness was first sworn by me that the evidence said witness should give in the action should be the truth, the whole truth, and nothing but the truth, before giving testimony; that the testimony of said witness was written by me in her presence, read to and subscribed by said witness in my presence.

I further certify that at the taking of said depositions neither party was present in person nor represented by agent or attorney.

My commission expires September 24, 1907.

BEN B. NELSON,
Notary Public within and for
Hamilton County, Ohio.

38 Following is "Exhibit X" filed as answer to interrogatory No. 9.

"EXHIBIT X." Ben B. Nelson, Notary Public.

"*Order Sheet of Old Kentucky Falls Distillery*, 322, 324, 326 *McFarland St., Cincinnati, Ohio.*

Date Mar. 21, 1905. No. of Order, 74.

Ship C. O. D. by Am. Express,
Charges Prepaid.

Gallons.	Quarts.	Name of goods.	Price C. O. D.
	4	Ky. Falls.....	$3.80

Name of Purchaser: Richard Graham.
Ship to (Name of Town): Hodgensville.
Post Office: Hodgensville.
County: ——; State: Ky.

Deposition endorsed on the back as follows:
"1905, Oct. 6, Received by mail properly sealed and filed. Att. L. M. Gore, Cl'k."

39 This was all of the evidence offered by the defendant or admitted by the court on its behalf. At the conclusion of all the evidence the defendant again moved the court to give the jury a peremptory instruction to find for it, to which motion plaintiff objected and the court being advised overruled said motion and refused to give said instruction, to which ruling of the court and refusal the defendant at the time excepted and still excepts.

Thereupon the court on its own motion gave to the jury instructions Nos. 1-2-3-4, to each and all of which instructions the defendant at the time objected and its objection being overruled excepted and still excepts. Also instruction No. 5. Said instructions are in words and figures as follows:

1. The court instructs the jury that if they believe from the evidence beyond a reasonable doubt that the defendant the American Express Co. in the City of Hodgensville, Larue County, Ky. within twelve months before the *issual* of the warrant herein sold whiskey in less quantity than five gallons at one time to Richard Graham and received from Graham the charges therefor you should find
40 the defendant guilty as charged in the warrant and fix its punishment at a fine in any sum not less than $60 nor more than $100 or at confinement in the County Jail for any time not less than ten days nor more than forty days or at both such fine and imprisonment.

2. The court further instructs the jury a delivery of said whiskey

in Hodgensville C. O. D. was a sale, unless said whiskey had been ordered by said Graham previously of the consignor M. E. Stone.

3. If the jury believe from the evidence that Richard Graham sent to M. E. Stone at Cincinnati, Ohio a written order to ship to him said whiskey at Hodgensville and that said Stone shipped said whiskey to Graham by the American Express Co. and said Express Co. delivered said whiskey to Graham and collected the charge therefor, they should find the defendant not guilty.

4. If the jury believe from the evidence that defendant American Express Co. did not know nor had reasonable grounds to be-
41 lieve that the package delivered contained whiskey they should find for defendant.

5. If they have a reasonable doubt of the defendant having been proved guilty they should find it not guilty.

42 These were all of the instructions asked, given or refused on the trial of this case and the jury having returned a verdict of guilty and assessed a fine of $100 and judgment being rendered therefor and the defendant filed grounds and moved the court to grant it a new trial which motion the court overruled and to which the defendant excepted and still excepts, and on its motion this Bill of Exceptions and statement of evidence is filed and made part of the record.

Which Bill of Exceptions is attested and approved by the court this the 14th day of May 1906.

C. T. ATCHISON,
Special Judge of the Larue Circuit Court.

Bill of Exceptions endorsed on the back as follows:
1906., May 14". Filed in open court. Att. L. M. Gore, Clk.

43 The following is the Supersedeas bond executed by the American Express Company.

Supersedeas Bond.

AMERICAN EXPRESS COMPANY, Appellant,
against
COMMONWEALTH OF KY., Appellee.

Upon an Appeal from a Judgment of the Circuit Court, Rendered — Day of May, 1906.

Whereas, said Appellant American Express Co. — an appeal from the Judgment of the Larue Circuit Court, rendered at its May term, 1906, against it in favor of the appellee for the sum of One Hundred Dollars and costs and the Appellant desires to supersede the whole — the said Judgment above mentioned:

Now, we, J. R. Langley, Chas. Moorman sureties, do hereby covenant to and with the Appellee Commonwealth of Ky. that the Appellant will pay to the Appellee all costs and damages that may be

adjudged against the Appellant on the Appeal, and also they
44 will satisfy and perform the whole Judgment above stated in case it shall be affirmed, and any Judgment or order which the Court of Appeals may render, or order to be rendered by the inferior Court, not exceeding in amount or value the whole Judgment aforesaid. (And also pay all rents, hire, or damage, which during the pendency of the Appeal, may accrue on any part of the property of which the Appellee is kept out of possession by reason of the Appeal.)

Witness our hands, this 19" day of May, 1906,

AMERICAN EXPRESS CO.,
J. R. LANGLEY, *Agent,*
J. R. LANGLEY,
C. H. MOORMAN,
By L. M. GORE, *Att'y in Fact.*

45 The following is the Power of Attorney empowering L. M. Gore to sign the name of C. H. Moorman to the above supersedeas bond,

Power of Attorney.

I, C. H. Moorman, of Elizabethtown, Hardin County, Kentucky, hereby nominate, constitute and appoint L. M. Gore of Hodgensville, Larue County, my attorney in fact for me in my name to sign my name to a supersedeas bond superseding the Judgment of One Hundred Dollars against the American Express Company and in favor of the Commonwealth of Kentucky in the Larue Circuit Court, which fine and Judgment were assessed at the May term of said Court, the same to have the same force and effect as if signed by me in my proper person.

Hereby ratifying and affirming same this May 17" 1906.

C. H. MOORMAN.

Witness:
S. R. BUSH.

46 STATE OF KENTUCKY, *Larue County:*

I, L. M. Gore Clerk of the Larue Circuit Court certify that the foregoing 45 pages of record is a full and complete transcript of all the pleadings &c., filed in my office in the case of the Commonwealth of Kentucky *vs.* American Express Co.

Given under my hand this 25" day of May 1906.

L. M. GORE,
Clerk, Larue Circuit Court.

Fee Copy $8.10.

47 And with said transcript the appellant filed a statement, and which is in words and figures as follows:—

Court of Appeals of Kentucky.

AMERICAN EXPRESS COMPANY, Appellant,
vs.
COMMONWEALTH OF KENTUCKY, Appellee.

Statement.

1. The name of the appellant is American Express Company,
2. The name of the Appellee is Commonwealth of Kentucky.
3. The judgment appealed from was rendered on the 8th day of May, 1906, at the May term of the Larue Circuit Court, and may be found on page 4 of the record.
4. Appellant does not wish to have a summons issue or warning order made.

C. H. MOORMAN,
Att'y for Appellant.

Be it remembered that at a Court of Appeals held at the Capitol at Frankfort on the 17th day of September 1906, the following order was entered towit:—

AMERICAN EXPRESS CO.
vs.
COMMONWEALTH.

Larue.

48 Came the appellant by counsel, and filed grounds, and moved the Court for an oral argument, herein, and also filed statement and moved the court for a subpœna *duces tecum* herein, which motions are submitted.

The grounds mentioned in foregoing order, are as follows:—

Court of Appeals of Kentucky.

AMERICAN EXPRESS COMPANY, Appellant,
v.
COMMONWEALTH OF KENTUCKY, Appellee.

Motion for Oral Argument.

Appellant moves the court for an oral argument of this case and for ground says:

1. That the instructions were erroneous involving the question whether or not transportation of liquor under the circumstances of this case would constitute a sale under the Statutes, Sec. 2557-B Subsec. 4 Kentucky Statutes.

2. Whether or not a peremptory instruction ought to have been given upon the ground that evidence of a transportation of liquor

in the usual course would constitute a sale within the Statute aforesaid.

49 3. Whether or not the transportation of the liquor in question is protected by the Commerce Clause of the Federal Constitution, a question arising under the Federal Constitution and constituting the principal question in the case, there being so far as counsel have found no case decided by this court involving the question, the case differing from the Adams Express cases and the Crigler case mentioned in the brief.

TRABUE, DOOLAN & COX,
For Appellants.

Court of Appe*lat*s of Kentucky.

AMERICAN EXPRESS COMPANY, Larue County, Appellants,
vs.
COMMONWEALTH OF KENTUCKY, Appellee.

Amended Grounds for Oral Argument.

In enumerating grounds for an oral argument in this case we omitted to suggest question discussed in other states notably Vermont and Maine: (See State *vs.* Goss, 59 Vermont 266, and State *vs.* McDonough, 84 Main- 488) as to the necessity of showing a *scienter* in such cases as the case now before the Court.

Very respectfully,

TRABUE, DOOLAN & COX,
For American Express Company.

50 The grounds of motion for a subpœna *duces tecum*, mentioned in above order is as follows:—

Court of Appeals of Kentucky.

AMERICAN EXPRESS COMPANY, Appellant,
v.
COMMONWEALTH OF KENTUCKY, Appellee.

Motion for Certiorari.

Appellant calls attention of this court to the fact that with the deposition of M. E. Stone is filed a yellow card which is said to contain an order given by Graham for the whiskey which was transported by appellant and for the transportation of which appellant has been fined in this case. That said order is important to a correct decision of this appeal.

Wherefore, appellant respectfully prays that a certiorari issue to the Clerk of the lower court to send to this court the order aforesaid, *to-wit*, the yellow card filed as exhibit with the deposition of M. E. Stone, or if this court deem more advisable, that the deposi-

51 tion with the order attached be sent to this court.

TRABUE, DOOLAN & COX,
For Appellant.

And afterwards on the 19th day of September 1906, at a Court of Appeals held at the Capitol at Frankfort, the following orders were entered:—

AMERICAN EXPRESS COMPANY
v.
COMMONWEALTH.

Larue.

The Court being sufficiently advised, it is considered that appellants motion for an oral argument be sustained, and said case is set for oral argument on November 16th, 1906.

AMERICAN EXPRESS COMPANY
v.
COMMONWEALTH.

Larue.

The Court being sufficiently advised, appellants motion for a subpœna *duces tecum* is sustained, and it is ordered that the Clerk of the Larue Circuit Court, transmit forthwith to the Clerk of this Court properly identified, the yellow card, filed as an exhibit, with the deposition of M. E. Stone herein to be used upon the hearing of this appeal.

And afterwards at a Court of Appeals held at the Capitol at
52 Frankfort, on the 25th day of September 1906, the following order was entered to-wit:

AMERICAN EXPRESS COMPANY
v.
COMMONWEALTH.

Larue.

Came the Clerk of the Larue Circuit Court, and filed response to order herein, together with exhibit "X" filed with the deposition of M. E. Stone herein.

The exhibit and response mentioned in the foregoing order is as follows:—

STATE OF KENTUCKY, *Larue County, sct:*

I, L. M. Gore, Clerk of Larue Circuit Court, certify that the card attached is the identical card marked as exhibit "X" filed with M. E. Stone's deposition in the case of Commonwealth of Kentucky vs. American Express Co.

Given under my hand this 22" Sept. 1906.

Att: L. M. GORE, *Clk.*

53 EXHIBIT "X." Ben. B. Nelson, Notary Publ.

Order Sheet—Old Kentucky Falls Distillery.

General Offices & Shipping Dep't, 322–324–326 McFarland St. Cin., O.

#60.

(274) Date Mar. 21, 1905. No. of Order 74 2 gal.
Ship C. O. D. by A. M. Mar. 21, 1905, Express.
Charges Prepaid.

Gallons.	Quarts.	Name of goods.	Price C. O. D.
	4	Ky. Falls.....	3.80

Name of Purchaser: Richard Grayam.
Ship to (Name of Town): Hodgensville.
Post Office: Hodgensville.
County: 2 (5); State: Ky.

54 And afterwards on the 16th day of November 1906 at a Court of Appeals held at the Capitol at Frankfort, the following order was entered towit:—

AMERICAN EXPRESS COMPANY
v.
COMMONWEALTH.

Larue.

Came appellee by counsel and filed grounds, and moved the Court to dismiss the appeal herein and said case is submitted on the motion and merits.

The written motion to dismiss appeal is in words and figures as follows:—

Kentucky Court of Appeals.

AMERICAN EXPRESS CO., Appellant,
vs.
COMMONWEALTH OF KY., Appellee.

Motion to Dismiss Appeal.

Came the appellee by counsel and moved the Court to dismiss the appeal herein for the reason set out in the brief of appellee.

N. B. HAYS, *Att'y Gen'l,*
For Appellee.

55 The grounds mentioned in the foregoing order to dismiss appeal, is in words and figures as follows:—

Kentucky Court of Appeals.

AMERICAN EXPRESS COMPANY, Appellant,
vs.
COMMONWEALTH OF KENTUCKY, Appellee.

Brief for Appellee.

On April, 19, 1905, the American Express Co. was summoned to appear before the Police Court of Hodgensville, on a charge of unlawfully selling spirit-ous liquors in the town of Hodgensville, a local option district.

(R. — 1).

On May 15, 1905, a Jury was waived and the law and facts submitted to the Court and Judgment in the two consolidated cases was rendered for $100 each. And an appeal was prayed to the Larue Circuit Court.

56 (R. — 2).

On May 8, 1906, it appears that some Court rendered the following Judgment:—

"May term, the 8th day of May 1906, the following order was entered,

Order.

This day came the Commonwealth's attorney and announced ready for trial. Came defendant by attorney and entered a plea of Not guilty, and announced ready for trial. Came the following jury to-wit: W. B. Roberts, B. F. Shipp, Smith Foster, J. B. Redmon, T. A. Lee, T. M. Sprowls, S. M. Catlett, Henry Pennington, J. A. Lamkin, J. B. Holland, J. W. Smith, Virgil Brooks who were duly empanelled and sworn to try the issue. On motion of the defendant it is ordered that Arch Pulliam the Official Stenographer take the full and complete proceedings of this case. At the conclusion of the evidence for the Commonwealth defendant moved the
57 Court for peremptory instructions. The Court being advised overruled said motion to which defendant excepts. At the conclusion of all the evidence the defendant renewed his motion for peremptory instructions and the Court being advised overruled said motion to which defendant excepts. After hearing all the evidence and receiving instructions they were permitted to go to their room to consider of their verdict. After some time returned to open court the following verdict to wit:

We the jury find the defendants guilty and fix their fine at one hundred dollars ($100.).

(Signed) T. A. LEE,
One of the Jury.

Came defendant by its attorney and moved the court to arrest judgment and the same was submitted to the court and the court being advised overruled said motion to which the defendant excepts;

Wherefore it is adjudged by the court that the Common-
58 wealth of Kentucky recover of the defendant the sum of one hundred dollars ($100) and the costs of this prosecution and execution may issue."

(R. — 4 & 5).

It does not appear from this record that the bond was ever approved as required by Sec. 724 C. Code, or that this appeal was ever consummated by the filing of the record in the circuit court of Larue County, and causing a summons to issue against the Commonwealth. The record shows that the appellant had summons issued against itself and executed on itself. Besides, it does not appear from the record in what Court the Judgment was rendered which is found (R. — 5). How can this court tell whether this appeal was taken from the Police Court to the Larue Circuit Court within the time prescribed by the Civil Code?

Civil Code Sections 725-726-727 and 729. Or in what Court were the following motions made?

May term 10" day of May 1906 the following order was entered:

59 *Order.*

This day came defendant by its attorney and filed grounds and moved the court to set aside verdict and judgment and grant a new trial herein and the same was submitted to the court and the court being advised overruled said motion and refused to grant a new trial to which the defendant excepts. The defendant prayed an appeal to the Court of Appeals which is granted upon condition that he lodge in the Clerk's office of said Court a transcript of the record in sixty days from the date of judgment.

Following is the motion and grounds for new trial referred to by the above order:

Motion and Grounds for New Trial.

The defendant the American Express Company moves the Court to vacate and set aside the verdict and judgment and to grant it a new trial herein for the following reasons, because

60 1st. Because the Court erred to the prejudice of the defendant in overruling motion for peremptory instruction to find for it made at the conclusion of the Commonwealth's evidence, to which ruling of the Court in overruling said motion the defendant at the time excepted and still excepts.

2nd. Because the Court erred to the prejudice of the Def't in overruling its motion for a peremptory instruction to find for it at the

conclusion of all the evidence, to which ruling of the Court in overruling said motion the Def't at the time excepted and still excepts.

3rd. Because the Court erred to the prejudice of the defendant in giving to the jury instructions No. 1-2-3-4 & 5 to the giving of each and all of which the defendants at the time excepted and still excepts.

4th. Because the verdict of the jury is against the law and
61 evidence and is contrary to the law and evidence.

C. H. MOORMAN,
Counsel for Defendant.

Evidence.

There was but one witness who testified, to-wit: M. E. Stone, whose evidence will be found from page 22 to page 33 inclusive of the Bill of Evidence, or in the Bill of Exceptions.

It will appear from his evidence that he resides in Cincinnati, Ohio, and is manager for a whole-sale liquor firm located in said city; that on March 21st, 1905 he received an order filed as an Exhibit "X" from Richard Graham of Hodgensville, Ky. for an order of whiskey to be sent C. O. D. for the delivery of which the warrant herein was issued against the appellant Company; that upon this order the whiskey in question was shipped to said Graham at
62 Hodgensville, Ky., and delivered to him and the charges therefor paid to the appellant Company who returned the same to the said house or firm in Cincinnati, Ohio. There is no proof to show that the Express Company had any knowledge or information as to the contents of said package so delivered, and there is nothing to show any notice to it whatever of the contents of said package. If the court is of the opinion that the Record is sufficient to show that the appeal was taken from the Police Court of Hodgensville and the Record was filed, the bond executed, approved and summons issued against the Appellee as required by Section 724 of the Code—which we believe it is not—then upon the former opinions of this Court, our judgment is that the case should be reversed. We, however, desire the court to pass upon this question in order that the many complications growing out of transactions similar to this, may be simplified, and the multitude of litigations growing out of the same lessened, whether or not a Company similar to the ap-
63 pellant can legally accept the price for whiskey shipped into a local option district, contrary to law, thus constitute itself a collecting agency for one who is under the shield of interstate commerce protected and permitted to ship whiskey into such districts. We are of the opinion that an Express Company has no inherent right under the laws of this State or under the protection of interstate Commerce to assume a duty not required of it, as a common carrier and to do that which is in violation of the laws of this State. Because we believe that this Record in its present shape, does not show that the appeal from the Police Court to the Circuit Court of Larue County was properly and legally taken and for the further reason,

that the Express Company has no right in violation of law to accept the price in a local option district of whiskey shipped C. O. D.

We ask that the judgment be affirmed.

N. B. HAYS,
C. H. MORRIS,
For Appellee.

64 And afterwards on the 21st day of Nov. 1906, at a Court of Appeals held at the Capitol, the following order was entered:—

AMERICAN EXPRESS CO.
v.
COMMONWEALTH.

Larue.

The Court being sufficiently advised it is considered that appellee's motion to dismiss the appeal herein, be and same is overruled.

And afterwards at a Court of Appeals held at the Capitol at Frankfort on the 27th day of November 1906, the following order was entered:

AMERICAN EXPRESS COMPANY
v.
COMMONWEALTH.

Larue.

Came the appellant by counsel, and moved the Court to set aside the order of submission herein, and grant an oral argument, and the Court being sufficiently advised, overruled the same, and it is considered that appellant be given one week's time to file brief.

65 And afterwards on the 5th day of December A. D. 1906 at a Court of Appeals held at the Capitol at Frankfort, the following judgment was entered:—

AMERICAN EXPRESS COMPANY, Appellant,
v.
COMMONWEALTH, Appellee.

Appeal from Larue Circuit Court.

The Court being sufficiently advised, it seems to them there is no error in the judgment herein.

It is therefore considered that said judgment be affirmed, and that the appellee recover of the appellant ten per cent. damages on the amount of the judgment superseded herein, which is ordered certified to said Court.

It is further considered that the appellee recover of the appellant its costs herein expended.

And on said date, the following opinion was delivered by the Court:—

66 Court of Appeals of Kentucky.

DEC. 5, 1906.

AMERICAN EXPRESS COMPANY, Appellant,
vs.
COMMONWEALTH OF KENTUCKY, Appellee.

Appeal from Larue Circuit Court.

Opinion of the Court by Judge Settle.

Appellant, American Express Company, was fined in the Hodgensville Police Court under a warrant charging it with selling spirituous liquors to-wit: A gallon of whiskey to one Richard Graham in the City of Hodgensville, where local option was in force. It thereupon took an appeal to the Larue Circuit Court and upon the trial in that court was again found guilty by verdict of a jury and
67 its punishment fixed at a fine of $100.00, and having been refused a new trial by the circuit court, it brings the case to this court by a further appeal.

The facts as shown by the bill of evidence were that Graham, the Commonwealth's witness, received notice by mail that there was a C. O. D. package for him at appellant's Hodgensville office; that he called at the office and obtained the package by paying appellant's local agent, Langley, the C. O. D. charge thereon of $3.85, that the package was in a box which had nothing on it to indicate its contents, or the name of the consignor. That no information was given him by the agent as to its contents and he, Graham, did not know what it contained when he received and paid for it, but upon opening the box which he at once did, he discovered therein four quart bottles of whiskey, and he and the agent each took a drink from one of the bottles, the latter being invited by him to do so. Graham further testified that he had not ordered the whiskey, was not
68 expecting it, and did not know the consignor, nor had he previously ordered or received whiskey in that way.

Langley, appellant's agent testified that he did not know the box contained whiskey until so informed by Graham after the latter had received, paid for and opened it, and that there were no words or marks upon the box to indicate its contents. Appellant did not introduce, or take the deposition of its Cincinnati agent, who received the box of the consignor in that city, or its train messenger in whose charge it was carried to Hodgensville. It did, however, take and read on the trial the deposition of M. E. Stone, of Cincinnati, manager of the company which shipped Graham the whiskey in question, who testified, in substance, that the company's name is Old Kentucky Falls Distillery, its chief office and place of business Cincinnati, and that it has no office or place of business in Kentucky; that

he as manager of the company shipped the whiskey upon an order from Graham which was received by mail. It does not ap-
69 pear from the deposition whether it was Kentucky whiskey, though the witness admitted his company dealt in Kentucky whiskey, but when asked if the package shipped Graham was Kentucky whiskey his answer was, "I cannot recall."

The witness also stated that he could not say whether appellant's Cincinnati agent who received the package knew its contents, but that in delivering to him the whiskey for shipment he gave the agent no "specific" notice that the "package contained liquor, or that it was to be carried into a local option district."

In addition to the above synopsis of Stone's testimony we quote from his deposition the following questions asked him and his answers thereto: Question 14. "Tell how this trade was opened up by you in Hodgensville? Answer. "I do not recall." 15. Did you receive Richard Graham's name from any one before shipment? If so, who sent it?" Answer. "I do not recall." Ques. 16:
70 "Did you have any arrangement either directly or indirectly with any one at Hodgensville or elsewhere by which you came into possession of the name of said Graham preparatory to this shipment?" Answer: "I do not recall any such arrangement." Question 18: "Did you receive this name and others to whom you shipped at this place and which enabled you to open up your trade in this town without previous arrangement on your part or other officers of your firm? If so tell how you came by them?" Answer, "I do not recall." Question 19. "Do you know by what method Richard Graham's name became known to your firm? If so state in minute detail." Answer, "I do not."

Question 20. "Was this shipment a mere venture to see what customers would take out the goods?" Answer, "This shipment was made on the strength of an order received from Richard Graham."

Question 27. "Does your firm send agents or salesman into such local option territory, and did you in this case to collect prospective customers? If you did who was the agent or salesman in
71 this case and where is he now?" Answer, "I do not recall sending any salesman into that territory."

Question 33. "Why did you send the package without any advertisement on the outside?" Answer. "I don't know that we did."

The alleged order on which Stone claimed to have shipped the whiskey to Graham was exhibited without the envelope in which it was sent. It exhibits no post marks, but its language is as follows:

"*Order Sheet of Old Kentucky Falls Distillery* 322, 323, 326, *McFarland Street, Cincinnati, Ohio.*

Date March 21, 1905. No. of Order 74.

Ship C. O. D. by Am. Express charges prepaid,

Gallons.	Quarts.	Name of goods.	Price C. O. D.
	4	Ky. Falls.....	$3.80

Name of Purchaser; Richard Graham.
Shipment to (Name of Town): Hodgensville.
Post Office; Hodgensville.
County ——; State, Ky."

72 Richard Graham was recalled and the second time asked as to his knowledge of the above order, and denied that he had written, signed or seen it, and was equally positive that he had not authorized any one to write, sign or make the order for him. Indeed, he denied on his examination in chief that he had ever heard of the Old Kentucky Falls Distillery Company or its manager until he got the whiskey shipped him. He also testified that though he had seen no one taking orders for whiskey in Hodgensville before the package in question was received by him, there was a man soliciting such orders just afterwards.

Langley, appellant's local agent admitted that he prepared and placed in the Hodgensville postoffice the postal card notifying Graham of the arrival of the package and requesting him to call and get it. Upon being required to produce in court the book kept in the express office for entering the receipt and delivery of packages, its entries showed that the package shipped to Graham, was

73 received at the Hodgensville office April 17th 1905, and delivered to Graham on the 18th, whereas it was received at the office March 24th 1905. On the 27th of March, the notice of its being there was mailed by Langley to Graham and the latter took it from the office March 29th 1905. It is patent from the discrepancies referred to that the entries in the book were not made as of the dates respectively on which the whiskey was received and delivered.

At the conclusion of the evidence for the Commonwealth and again after all the evidence was introduced, appellant moved the court to peremptorily instruct the jury to find it not guilty, but both motions were overruled and the court instructed the jury as follows:

1. The court instructs the jury that if they believe from the evidence beyond a reasonable doubt that the defendant, the American Express Co. in the City of Hodgensville, Larue County, Kentucky, within twelve months before the *issual* of the warrant herein, sold

whiskey in less quantity than five gallons at one time to
74 Richard Graham, and received from Graham the charge therefor, you should find the defendant guilty as charged in the warrant and fix its punishment at a fine in any sum not less than $60.00 nor more than $100.00, or at confinement in the County jail for any time not less than ten days, nor more than forty days, or at both such fine and imprisonment.

2. The court further instructs the jury a delivery of said whiskey in Hodgensville C. O. D. was a sale, unless said whiskey had been ordered by said Graham previously of the consignor M. E. Stone.

3. If the jury believe from the evidence that Richard Graham sent to M. E. Stone at Cincinnati, Ohio, a written order to ship to him said whiskey at Hodgensville, and that said Stone shipped said whiskey to Graham by the American Express Co. and said Express Company delivered said whiskey to Graham and collected the charge therefor, they should find defendant not guilty.

4. If the jury believe from the evidence that defendant,
75 American Express Company, did not know, nor had reasonable grounds to believe that the package delivered contained whiskey they should find for defendant.

5. It they have a reasonable doubt of the defendant having been proved guilty they should find him not guilty. It is insisted for appellant that it was error to refuse the peremptory instruction, and more so to instruct the jury as was done by the trial court, and this contention rests upon the theory that the shipment of whiskey, on account of which appellant was found guilty under the warrant, was interstate commerce and therefore cannot be regulated or interfered with by a trial and conviction of appellant under the laws of this state as attempted in this case. We cannot sustain this contention if, in truth, the transaction here presented was a mere selling of whiskey in a local option territory through the instrumentality of the express company.

If there was any evidence in this case that the whiskey was not ordered by Graham from the Cincinnati Company; that the
76 pretended order therefor upon which his name appears was a forgery, and that the appellant Express Company knew it was whiskey when received and delivered by it, the verdict should be permitted to stand. There was evidence on both sides of these several propositions, but the jury had the right to accept the statements of Graham that he did not know and had never heard of the Cincinnati Company before receiving the package in question; that he had never ordered any whiskey of them, and had never signed the written order or authorized it to be written or forwarded, as against the statements of Stone the manager of the Cincinnati shipper, that he had received the order.

In the long and evasive deposition of the latter no fact is stated that conclusively contradicts Graham. Stone was not even acquainted with Graham and no attempt was made to prove by the latter's neighbors, or acquaintances that the order was in his handwriting. Graham cannot be prosecuted for receiving and
77 paying for the whiskey, his connection with the transaction offered no inducement to him to suppress or misrepresent the

facts, nor had he any interest in the result of the prosecution against appellant. But this was not true of the position occupied by Stone, or appellant's agent, Langley. The jury also had the right to reject the testimony of appellant's agent, Langley, and to conclude that there was enough in the circumstances connected with the shipment of the package to show knowledge on his part or that of appellant's other agents through whose hands it passed, that it contained whiskey. For it would do no violence to appellant's rights to presume that it had some knowledge of the business of so valuable a patron as a Cincinnati whiskey house, and that in accepting a shipment from such a concern its agents would make some effort to discover what it was. The fact that the box containing the whiskey was unmarked by the brand of the shipper or with the name of the place from which it was shipped, and the further fact that,
78 in accepting it for shipment appellant assumed responsibility for its safe delivery and would, therefore, be liable for its value if lost, was sufficient to put them upon inquiry as to its contents. No doubt the jury also attached some significance to the fact that appellant did not give itself the benefit of the testimony of its receiving agent at Cincinnati, or of the messenger who had charge of the package from the time it left Cincinnati until it reached Hodgensville, that they might acquit themselves and it of the imputation of knowledge as to its contents.

It may be said here as held in Adams Express Company *vs.* Comlth. 92 S. W. 932; "The Commonwealth proved facts which of themselves established the guilt of the defendant company." It showed the existence of the prohibition law in the town of Hodgensville, the delivery of liquor by appellant to Graham, and the payment of the price by the latter to its agent. These facts make a case for the Commonwealth, unless appellant's explanation of the
79 transaction presented such a defense as took it out of the statute, the burden of showing which was upon it. If the jury were of the opinion that this was not done by the evidence it had the right to find appellant guilty.

It is argued that though it be conceded that appellant by its agents knew the package in question was whiskey, as it had the right to assume that it had been ordered by the consignee and that the shipper after effecting the sale in Cincinnati was simply shipping it for delivery in due course, there was nothing in the transaction to warn appellant of its illegality. It does, however, appear from the evidence that Graham failed to call for or inquire about the package until notified of its arrival, which would not have been probable if he had ordered and was expecting it, and that when he went for it, he asked appellant's agent whence it came and what it contained, before it was paid for or delivered to him. This was sufficient to indicate to the agent that he had not ordered it, and that the shipment was not a *bona fide* one.

80 The case at bar differs from that of Adams Express Co. *vs.* Comlth., *supra*, only in the fact that in the latter the defendants were proved to have made a score or more deliveries of whiskey in local option territory upon illegal shipments from Cin-

cinnati, which were held to give it knowledge of the illegality of the system it was instrumental in maintaining, whereas in the case at bar, there was but one sale.

We are unable to see that this difference makes appellant less guilty if in fact it knowingly aided the shipper to violate the law. In Adams Express Co. *vs.* Comlth. 27 R. 1096, it was held that a conviction of the defendant for one such transaction was proper, it being shown that it knowingly delivered to the consignee in a local option district whiskey, which he had not ordered, and collected of him the price thereof.

We do not feel at liberty to say that the verdict of the jury is without support from the evidence, and in our view of the
81 law the instructions were proper. If such a transaction as is here presented is permitted, it would not only render impossible the enforcement of prohibition in local option districts, but would also, in large measure, place the retailing of spirituous liquors in this state in the hands of irresponsible foreign dealers, who, though not themselves amenable to the jurisdiction and process of the courts of the state, can, through their willing instruments, the express companies, violate its laws with impunity. We cannot afford to set in motion such a train of evils.

Judgment affirmed.

N. B. HAYS, *Att'y Gen'l,*
C. H. MORRIS,
D. A. McCANDLESS,
CHAS. CREEL,
For Appellee.

TRABUE, DOOLAN & COX,
C. H. MOORMAN,
For Appellant.

82 Be it remembered that on the 2nd day of January A. D. 1907 the appellant by its attorney filed in the office of the Clerk of the Court of Appeals, a petition for rehearing.

Be it remembered that at a Court of Appeals at the Capitol at Frankfort on the 7th day of January 1907, being court in course the following order was entered:—

AMERICAN EXPRESS COMPANY
v.
COMMONWEALTH.

Larue.

Came the appellant by counsel, and on motion, the petition filed in the office of the Clerk of this Court, is now noted of record, and moved the Court to grant a rehearing, which motion is submitted.

The petition mentioned in foregoing order is as follows:—

83 Court of Appeals of Kentucky.

September Term, 1906.

Appearance Docket No. 21.

AMERICAN EXPRESS COMPANY, Appellants,
versus
COMMONWEALTH OF KENTUCKY, Appellee.

Petition for Rehearing.

Appellants (unincorporated), American Express Company, respectfully ask a rehearing of the decision herein because,

First, this case was not heard by the whole court and,

Secondly, for reasons upon the merits as hereinafter indicated.

I.

Rule 2 provides:

"Whenever a case involves a constitutional question either Federal or State, or in any case where, in the opinion of the Chief
84 Justice, the importance of the case requires, both departments shall hear the argument, whether oral or written, and pass on the questions involved, etc."

This case involves two questions under the Federal Constitution, to wit, first, whether or not appellants were deprived of "liberty," and "property," without due process, because the presumption of innocence was disregarded, as discussed upon page 12 of our brief; and, secondly, whether or not the statute under which appellants were convicted conflicted with Art. I, Sec. 8, Sub-sec. 3 of the Federal Constitution in attempting to regulate commerce, discussed in brief, page 13, *et seq.*

a.

Upon the first proposition we cited Cooley, Const. Lim., 6th Ed., p. 375, 7th Ed., p. 437; Sullivan *v.* Oneida, 61 Ill. 242; and State *v.* Divine, 96 N. C. 778, 4 S. E. Rep. 477.

The instructions required the Express Company to show
85 affirmatively that the order for the whiskey received by the consignor was genuine, and made guilt turn upon its genuineness regardless of appellants' knowledge. Upon the authorities cited we claimed that the instructions violated the Fourteenth Amendment in depriving appellants of the presumption of innocence. This raised a question under the Federal Constitution.

b.

Appellants also claimed that the Act under which they were convicted offended the Commerce Clause of the Federal Constitution, because the transportation in question was interstate, and appellee contended that the statute was valid because no order for the whiskey

was given. Clearly, therefore, whether appellant be innocent or guilty, the question of guilt is one arising under the Federal Constitution. The validity of the statute is attacked principally upon the authority of the Commerce Clause of the Federal Constitution.

86 The circumstance that this Court has decided both Federal questions against appellants does not prove that the questions did not exist, but proves that they did exist. A Federal question exists whenever the unsuccessful litigant has claimed in the State court that a State statute under which his life, liberty or property is taken is in conflict with the Federal Constitution. It is not necessary that such litigant make good his claim in order to establish that a Federal question is involved. If he make good his claim he demonstrates not only that the Federal question is involved, but that he is entitled to have it decided in his favor. Whether or not he is entitled to a favorable decision in the matter is the Federal question, or is the question under the Federal Constitution, and in such case this court's rule requires the whole court to sit. The criterion of the existence of a Federal question is the presence or absence of

87 jurisdiction in the Supreme Court, which exists whenever an unsuccessful litigant has claimed in the State court that a State statute, the basis of his conviction, is in conflict with the Federal Constitution. Wedding *v.* Meyler, 192 U. S. 573, 48 L. Ed. 570, and note. It is, therefore, demonstrable that such question is involved, and involved upon both claims of appellants in this case.

Wherefore, we submit that a rehearing should be granted in order that appellants may have the judgment of the whole court upon the questions arising under the Federal Constitution.

II.

Upon the merits we submit,

1. That no evidence of appellants' knowledge that the transported box contained whiskey was introduced, and that guilty knowledge is indispensable to guilt.

2. That Instruction No. 4 permitting acquittal only in case appellants had no reasonable ground to believe the package

88 contained whiskey, is erroneous.

3. That Instructions 2 and 3, requiring conviction unless Graham, consignee, actually sent the order which Stone received, is erroneous.

4. That Instructions 2 and 3 deprived appellants of the presumption of innocence, and offend the Fourteenth Amendment to the Federal Constitution, and Section 11, Kentucky Bill of Rights.

5. That appellants are illegally convicted under a statute in conflict with the Commerce Clause of the Federal Constitution.

a.

With great deference we submit that there is no evidence of appellants' knowledge. It is no refutation of our claim to say that we omitted to introduce our Cincinnati agent receiving the box because, first, appellee introduced no evidence of our knowledge, and,

secondly, the consignor, Miss Stone, swore that the agent had
89 no knowledge. We, therefore, controvert that the failure to introduce the agent constitutes a suspicious circumstance, much less a scintilla of evidence of knowledge, even a scintilla sufficed for conviction. We contest that guilt can be established upon such mere surmise, when belief beyond a reasonable doubt is indispensable. Miss Stone testified, as remarked in the opinion, that the company of which she was manager was once "Old Kentucky Falls Distillery," but did not testify that our agent knew it, and she and not the company was consignor. Instruction 3 recognizes that the order was "sent to M. E. Stone," and it does not appear that the agent knew M. E. Stone to be an officer of the distilling company, nor knew that she was shipping a package for that company. That guilty knowledge must be established see State *v.* McDonough, 80 Me. 488; Ellington *v.* State (Tex.), 86 S. W. Rep. 330, and inferentially see Adams Express Co. *v.* Com., 87 S. W. 1011, 27 Ky. L. R. 1096, and Crigler *v.* Same, 87 S. W. 276, 27 Ky. L. R. 918, and discussion in brief p. 3, *et seq.*

90 In Herne *v.* Garton, 2 El. and Bl. 66, 105 E. C. L. 66, a criminal proceeding against the consignors, who were acting as agents for one Nicholas, in shipping vitriol, prosecuted under a statute providing that "every person who shall send or cause to be sent by the said railway, any vitriol," etc., without being distinctly marked as such, should forfeit 10 L or be imprisoned, it was held that guilty knowledge was essential to conviction. Upon this point all the Barons concurred. They held that the consignors would have been liable civilly, but not liable criminally, especially when the statute provided for imprisonment.

b.

Instruction 4 requires conviction unless appellants did not know and had no reasonable ground to believe the package contained whiskey. This is erroneous, first as requiring diligence of
91 appellants; and, secondly, in requiring conviction if appellants knew or had reasonable ground to believe the box contained whiskey, although an inquiry if made would have discovered that M. E. Stone received a written order for the whiskey presumably signed by Graham. In Ellington *v.* State, *supra,* the court exonerated an Express Company's agent where he was not aware that the shipment was not in pursuance of a contract. The opinion contains an able discussion of the accused's rights under the criminal law, and is cited in brief, p. 8.

c.

We dispute that appellants were guilty if the order sent to Miss Stone was not signed by Graham or his authorized agent, or that appellants' guilt can depend upon the genuineness of an order. Instructions 2 and 3 make immaterial either knowledge or belief on the part of either appellants or the consignor, but make appellants' guilt dependent solely upon the genuineness of Graham's

signature to the order. If Graham signed the order card or
92 authorized another to sign it, then the instructions direct acquittal, otherwise direct conviction. Under such instructions the carrier is helpless: If he know the package to contain liquor, and know the destination to be a local option district and refuse to receive the shipment until shown an order card declared by the consignor to be genuine, and by both consignor and the carrier believed to be genuine, the carrier is nevertheless guilty under the instruction, without opportunity of exoneration if the order turn out a forgery! The instruction assumes the carrier's duty to carry if the card be genuine, but the carrier to be criminally responsible if the card be spurious, with no opportunity to determine the genuineness or spuriousness of the order. We submit that such an instruction is erroneous as an exposition of criminal law, and erroneous as an impediment to interstate commerce.

The instruction is demonstrably erroneous for another reason, to wit, that ratification is equivalent to previous authority,
93 *rathihabitio mandato aequiparatur*. Unquestionably, therefore, Graham ratified the act of his agent who sent the card by accepting and drinking the whiskey. This acceptance consummated the sale by M. E. Stone, of Cincinnati, to Richard Graham, of Hodgensville. This sale was interstate commerce even under the hypothesis of the opinion. But under the doctrine of the instructions the carrier would be innocent if Graham sent an order, or authorized any one to send it for the whiskey, but guilty if he afterward ratified the act of his volunteer agent.

If a previous order for liquor were essential to a sale interstate, the vendor receiving the order might, possibly, with propriety be put upon inquiry as to the genuineness of the order, but a carrier surely can not be criminal or innocent dependent upon such an issue *inter alios* without any power to decide it, and compellable to decide it instanter. Even inquiry of, and deception by the consignor would not save the carrier under the instructions criticised. The carrier's *bona fides* is immaterial. Without power to ascertain the
94 truth the carrier is required to guarantee the genuineness of the order. We submit that there is no such principle of jurisprudence, and the opinion under review does not discuss the question. For further argument see Brief, p. 9, *et seq.*

d.

Instructions 2 and 3, just criticised, violate the Fourteenth Amendment to the Federal Constitution, and Sec. 11, Kentucky Bill of Rights in making the innocent exercise of a right, and performance of a duty *prima facie* evidence of guilt, and depriving the accused of the presumption of innocence.

In State *v.* Divine, *supra*, the court said:

"Thus, in every criminal prosecution under this act, the defendant is deprived of the benefit of that great and fundamental rule of the common law, that every man shall be considered innocent until proved to be guilty," etc. "The clauses in question subvert the presumption of innocence, and alter the rules of evidence which

heretofore, under the universally recognized principles of
95 the common law, have been supposed to be fundamental and unchangeable."

Citing State *v.* Beswick, 13 R. I. 211.

The court quoted from Selden, J., 13 N. Y. 446, these words:
"Precisely how far the Legislature may go in changing the modes and forms of judicial proceedings I shall not attempt to define; but I have no hesitation in saying that they can not subvert that fundamental rule of justice which holds that every man shall be presumed innocent until he is proved guilty."

See, also, cases cited in Brief, p. 12, *et seq.*

e.

The statute constituting the basis of this conviction, as construed by Instructions 2 and 3 (and irrespective of such construction too), offends the Commerce Clause of the Federal Constitution, and, moreover, imposes an insuperable impediment upon interstate commerce. To require of carriers the duty of determining, as above expounded, the genuineness of orders for goods, enforceable
96 by criminal proceedings involving heavy penalties in event a carrier compellable to act at his peril make a mistake, imposes upon commerce an impediment next to prohibitive. Commerce can not be carried on under such conditions; please see Brief, p. 13 *et seq.*

The transportation from Cincinnati to Hodgensville was interstate. We contend that it was interstate commerce. If not, then Congress would have no power to regulate it, but *e contra*, Ohio and Kentucky might regulate the transportation within their respective territory. Regulation of the freight rates would belong to those States, not to Congress. The Interstate Commerce Act would not apply unless the order received by Stone was Graham's genuine act and deed. Is such the construction of the Interstate Commerce Law? Does the power of Congress to regulate the transportation depend upon the genuineness of Graham's signature or the terms of his authority, if any, to sign his name?

Commerce is not barter only or "traffic," it includes "in-
97 tercourse," Gibbons *v.* Ogden, 9 Wheat, 1, 203, 235; 6 L. Ed. 71, 79, etc.

Commerce consists also in the transportation of passengers from one State to another, and there is no sale of the passenger as a basis of the transportation, supposedly essential to "commerce." Hall *v.* DeCuir, 95 U. S. 485, 488, 24 L. Ed. 547, 548, etc.

Transportation is itself commerce, and the power to regulate transportation is in Congress, and the State accordingly prohibited such regulation, Handley *v.* K. C. S. R. R. Co., 187 U. S. 617, 47 L. Ed., 333, where the Supreme Court denied the Arkansas Railroad Commission the right to regulate rates upon transportation from one point to another in Arkansas over a route through the Indian Territory. The shipment was there between consignee and consignor in Arkansas. That transportation was not between per-

sons in different States. Had the goods traveled over a road wholly within Arkansas, no element of interstate commerce would have existed, but where the goods left the State, Arkansas' regu-
98 lation was excluded. If Arkansas could regulate a part, the Indian Territory could regulate another part. The Supreme Court said (p. 619):

"It may be assumed further, as implied by the language just quoted, that the transportation in the present case was commerce." Citing the Interstate Commerce Act, Gloucester Ferry Co. *v.* Penn., 114 U. S. 196, etc., and other authorities.

"Transportation for others, as an independent business, is commerce, irrespective of the purpose to sell or retain the goods which the owner may entertain with regard to them after they shall have been delivered."

Further said (P. 620):

"The transportation of these goods certainly went outside
99 of Arkansas, and we are of opinion that in its aspect of commerce it was not confined within the State. Suppose that the Indian Territory were a State, and should try to regulate such traffic, what would stop it? Certainly not the fiction that the commerce was confined to Arkansas. If it could not interfere, the only reason would be that this was commerce among the States. But if this commerce would have that character as against the State supposed to have been formed out of the Indian Territory, it would have it equally as against the State of Arkansas. If one could not regulate it, the other could not.

"No one contends that the regulation could be split up according to the jurisdiction of State or Territory over the track, or that both State and Territory may regulate the whole rate. There can be but one rate, fixed by one authority, whether that authority be Arkansas or Congress." (Citing authorities.)

100 Interstate transportation is, then, interstate commerce independently of the nature of the transaction between consignor and consignee.

See, also, Rhodes *v.* Iowa, 170 U. S. 412, 426 (42 L. Ed. 1088); Caldwell *v.* N. C., 187 U. S. 622 (47 L. Ed. 337); Am. Ex. Co. *v.* Iowa, 196 U. S. 133 (49 L. Ed. 417), and Adams Ex. Co. *v.* Same, *Ibid* 147 (49 L. Ed. 424.)

The C. O. D. feature of this transaction is immaterial; 170 U. S. 412, 426, 196 U. S. 133, *Ibid* 147, *supra.*

Wherefore, for all these reasons we respectfully pray a rehearing.

TRABUE, DOOLAN & COX,
Counsel for Appellants, American Express Company.

CHAS. H. MOORMAN,
Of Counsel.

101 And afterwards on the 9th day of January A. D. 1907 at a Court of Appeals held at the Capitol at Frankfort, the following order was entered:—

AMERICAN EXPRESS COMPANY
v.
COMMONWEALTH.

Larue.

The Court being sufficiently advised, it is considered that motion and petition of appellant for a rehearing be and the same is hereby overruled.

102 Be it remembered that on the 19 day of January, 1907, there was filed in the office of the Clerk of the Court of Appeals, a petition for Writ of Error, and which is hereto attached as follows:

103 Court of Appeals of Kentucky

AMERICAN EXPRESS COMPANY, Plaintiffs in Error,
v.
COMMONWEALTH OF KENTUCKY, Defendant in Error.

Petition for Writ of Error and Assignment of Errors.

The above named American Express Company, partnership or joint stock company, with principal office in the City of New York, State of New York, conceiving themselves aggrieved by the decision made and judgment rendered by the Court of Appeals of Kentucky in the cause of the above named plaintiffs in error against the above named defendant in error in said court at its October Term, A. D. 1906, *to-wit* on the 5th day of December, A. D. 1906, said court being the highest court of the State of Kentucky and the court of last resort for the hearing and determination of said cause, in which cause was drawn in question the validity of a Statute of the State of Kentucky, *to-wit,* an Act of the General Assembly of the Commonwealth of Kentucky, being Chapter 14 of the Acts of 1902, page 41, *et seq.,* approved March 11, 1902, and especially Section 4 of said Act, constituting Section 2557-B and especially Sub-section 4 of said Section of the Kentucky Statutes, edition of 1903, upon the ground that it was repugnant to the Constitution of the United States and especially Article I, Sub-section 8 of said Constitution under which plaintiffs in error claimed immunity and privilege of exemption from the operation or effect of said State Statute; and also in

104 which cause the said plaintiffs in error claimed immunity and privilege of exemption from the obligation to prove that the liquor in question shipped by the plaintiffs in error was by the consignee ordered of the consignor to be shipped, and claimed the benefit of the presumption of innocence vouchsafed to all persons accused of offenses, asserting said claim under the Fourteenth Amendment to the Constitution of the United States forbidding any State through any of its officers to deprive any person of due process of law, and the decision of said State Court was in favor of the

validity of the Statute aforesaid, and against both the said rights specially set up and claimed as aforesaid under the Constitution of the United States by said plaintiffs in error, the said rights specially claimed and set up being the rights aforesaid and the said rights being denied as aforesaid by said State Court by virtue of said State Statute.

Present herewith their assignment of errors and pray for a writ of error to issue out of the Supreme Court of the United States to said Court of Appeals of Kentucky to the end that the record in said matter may be removed to the said Supreme Court of the United States, and the errors complained of by plaintiffs in error may be examined and corrected and the judgment aforesaid of said Court of Appeals be reviewed and reversed.

EDMUND F. TRABUE,
Counsel for Plaintiffs in Error.

Filed, January 19th A. D. 1907.

ED. C. O'REAR,
Chief Justice Court of Appeals of Kentucky.

J. MORGAN CHINN,
Clerk of the Court of Appeals of Kentucky.

[Endorsed:] Filed Jan. 19 1907. J. Morgan Chinn, C. Ct.

105 And on said date there was filed in the office of the Clerk of the Court of Appeals, an Assignment of Errors, and which is hereto attached as follows:

106 Court of Appeals of Kentucky.

AMERICAN EXPRESS COMPANY OF NEW YORK, STATE OF NEW YORK,
v.
COMMONWEALTH OF KENTUCKY.

Assignment of Errors.

Plaintiffs in error, American Express Company of New York, State of New York, feeling themselves aggrieved by the findings and judgment of the Court of Appeals of Kentucky in the above entitled cause, come by their counsel and assign errors thereto as follows, to-wit:

I.

The Court of Appeals of Kentucky, aforesaid, erred in deciding that the Statute under which plaintiffs in error were convicted, viz., Chapter 14, Acts 1902 approved March 11, 1902, being Section 2557-B of Kentucky Statutes, and especially Sub-section 4 thereof was not in conflict with Article I, Section 8, commonly called the "Commerce Clause" of the Constitution of the United States, and in deciding that the transportation by plaintiffs in error of the liquor

in question was not interstate commerce, or commerce among the several states.

II.

The Court of Appeals of Kentucky aforesaid erred in deciding that the transportation by plaintiffs in error of the liquor in question from the City of Cincinnati in the State of Ohio to the town of Hodgensville in the State of Kentucky was not commerce among the several states within the intent and meaning of the Commerce Clause of the Constitution of the United States because it had been decided in that case by the verdict of a jury and judgment
107 of the trial court that the consignee had not actually executed or authorized anyone else to execute the written order upon the consignor to ship said liquor to the consignee which was received by the consignor.

III.

The Court of Appeals of Kentucky aforesaid erred in affirming the judgment of the trial, or Circuit Court of Larue County, Kentucky, denying to plaintiffs in error the immunity and privilege specially set up and claimed by them under the aforesaid Commerce Clause of the Constitution of the United States by instructing the jury to find the said plaintiffs in error guilty under the aforesaid Statute of Kentucky if the consignee did not actually give to or upon the consignor an order to sell and ship the said whiskey.

IV.

The Court of Appeals of Kentucky aforesaid erred in affirming the judgment of the trial or Circuit Court aforesaid denying to plaintiffs in error the immunity and privilege specially set up and claimed by them under the aforesaid Commerce Clause of the Constitution of the United States by instructing the jury to find the said plaintiffs in error guilty under the said Kentucky Statute if the said plaintiffs in error knew or had reasonable ground to believe that the package transported by said plaintiffs in error from Cincinnati aforesaid to Hodgensville aforesaid contained spirituous or other intoxicating liquor; notwithstanding said transportation was, as claimed by plaintiffs in error, commerce among the several states.

V.

The Court of Appeals aforesaid erred in deciding that the
108 Kentucky Statute aforesaid, as construed by the trial or Circuit Court aforesaid making the mere fact of transportation of intoxicating liquor constitute the offense prescribed by the Statute, did not deprive the plaintiffs in error, as was specially set up and claimed by them, of their liberty or property without due process of law in its denying to the said plaintiffs in error the presumption of innocence, and in its requiring them by its instructions to the jury to establish affirmatively their innocence and to convict them of the offense prescribed by said Statute unless they affirmatively proved their innocence of the offense charged, or

proved their justification under the Constitution of the United States.

EDMUND F. TRABUE,
Counsel for Plaintiffs in Error.

Filed January 19th, A. D. 1907

J. MORGAN CHINN,
Clerk of the Court of Appeals of Kentucky.

ED. C. O'REAR,
Chief Justice Court of Appeals of Kentucky.

[Endorsed:] Filed Jan. 19, 1907. J. Morgan Chinn, C. Ct.

109 And on said date there was filed in the office of the Clerk of the Court of Appeals a Writ of Error, and the order allowing the same and which is hereto attached, as follows:

110 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the Court of Appeals of Kentucky, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals of Kentucky, being the highest court of law or Equity of the said state of Kentucky in which a decision could be had in the said suit between the American Express Company, of New York, state of New York, plaintiffs and the Commonwealth of Kentucky, defendant, wherein was drawn in question the validity of a statute of the State of Kentucky on the ground of its being repugnant to the Constitution of the United States and the decision was in favor of such state statute, and against the right, privilege, and immunity specially set up and claimed under the Constitution of the United States by the said American Express Company, a manifest error hath happened, to the great damage of the said American Express Company, as by their complaint appears; We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, in the District of Columbia on the Eighteenth day of February next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the Nineteenth day of January, in the year of our

Lord one thousand Nine hundred and seven, and of the Independence of the United States of America the one hundred and thirty-first.

[Seal 6th Circuit Court, Eastern Ky. Dis. U. S. of America.]

WALTER G. CHAPMAN,
Clerk of the Circuit Court of the United States,
Eastern District of Kentucky at Frankfort.

Allowed by
ED. C. O'REAR,
Chief Justice of the Court of Appeals of Kentucky.

[Endorsed:] Filed Jan. 19, 1907. J. Morgan Chinn, C. Ct.

111 And on said date there was filed in the office of the Clerk of the Court of Appeals, the original Citation, and proof of service endorsed thereon and which is hereto attached as follows:

112 *Original.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Commonwealth of Kentucky, Greeting:

You are hereby cited and admonished to be and appear at a session of the Supreme Court of the United States, to be holden at Washington, on the Eighteenth day of February next, pursuant to a Writ of Error filed in the Clerk's Office of the Court of Appeals of Kentucky, wherein the American Express Company of New York, State of New York are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this Nineteenth day of January in the year of our Lord one thousand nine hundred and seven, and of the Independence of the United States of America the one hundred and —.

ED. C. O'REAR,
Chief Justice of the Court of Appeals of Kentucky.

Attest:
J. MORGAN CHINN,
Clerk, Court of Appeals of Ky.

Service of citation acknowledged this 19th day of January, A. D. 1907.

N. B. HAYS,
Attorney General.

113 And on said date there was filed in the office of the Clerk of the Court of Appeals, a writ of error bond, and which is in words and figures as follows, to wit:

Court of Appeals of Kentucky.

AMERICAN EXPRESS COMPANY OF NEW YORK, Plaintiffs in Error,
v.
COMMONWEALTH OF KENTUCKY, Defendant in Error.

Bond.

Know all men by these presents: That the American Express Company of New York, State of New York, principals and Ely D. Graff, surety, are held and firmly bound unto the above named Commonwealth of Kentucky in the sum of five hundred dollars to be paid to the obligee herein, to which payment well and truly to be made we bind ourselves and each of us jointly and severally and our and each of our heirs, executors and administrators firmly by these presents;

114 Sealed with our seals and dated the 18th day of January, A. D. 1907.

[SEAL.] AMERICAN EXPRESS COMPANY,
By ELY D. GRAFF, *Gen'l Ag't.*
[SEAL.] ELY D. GRAFF.

Whereas, the above named American Express Company of New York, City of New York has prosecuted a writ of error from the Supreme Court of the United States to reverse the judgment rendered on the 5th day of December, A. D. 1906, by the Court of Appeals of Kentucky in the case of the said American Express Company against the said Commonwealth of Kentucky:

Now, therefore, the condition of this obligation is such that if the above named American Express Company, shall prosecute its said writ of error to effect; and shall answer all damages and costs, including amount of judgment, that may be awarded against them if they fail to make good their plea, then the above obligation to be void, otherwise to remain in full force and virtue.

115 Sealed in the presence of us this the 18th day of January, A. D. 1907.

M. A. CURLEY.
V. C. YEAGER.

Approved by me this 19th day of January, A. D. 1907.

ED. C. O'REAR,
Chief Justice Court of Appeals of Kentucky.

116 THE COMMONWEALTH OF KENTUCKY,
The Court of Appeals, set:

In obedience to the commands of the within Writ of Error, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the case named in said Writ, with all things concerning same.

In testimony whereof I have hereunto set my hand and affixed my official seal.

Done at the Capitol at Frankfort this the Nineteenth day of January, A. D. 1907.

[Seal Court of Appeals of Kentucky.]

J. MORGAN CHINN,
Clerk Court of Appeals of Kentucky.

Endorsed on cover: File No. 20,548. Kentucky court of appeals. Term No. 583. American Express Company of New York, plaintiff in error, *vs.* The Commonwealth of Kentucky. Filed January 26th, 1907. File No. 20,548.